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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-198202

DATE: December 29, 1980

MATTER OF: Thomas E. Witter v. Pennsylvania National Guard, 462 F. Supp. 299 (1978) Availability of funds to reimburse state the cost of judgment

DIGEST:

Appropriated funds under 31 U.S.C. 724a or otherwise are not available to reimburse the Commonwealth of Pennsylvania the cost of judgment in Witter v. Pennsylvania National Guard, where the United States was not a party to the suit. The judgment was against the state as employer which improperly refused to reinstate National Guard civilian employee to his former position upon his release from active duty.

By letter dated March 21, 1980, Lieutenant General La Vern E. Weber, USA, Chief, National Guard Bureau, requested an advance decision as to whether appropriated funds are available to reimburse the Commonwealth of Pennsylvania the amount of \$5,326.53 which it paid as damages pursuant to a judgment in the case of Thomas C. Witter v. Pennsylvania National Guard, 462 F. Supp. 299 (1978). Although the United States was not named a defendant in that case we are asked whether funds are available for reimbursement to the state in view of the fact that the Federal Government provides the funds for technicians salaries and since an adjutant general of a state National Guard has been held to be an agent of the United States pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. 709 in matters concerning the employment of such technicians. See Chaudoin v. Atkinson, 494 F. 2d 1323, 1329 (3d Cir. 1972). The Bureau asserts that the United States was an appropriate party to the action and that the judgment would have run against the United States, but for the failure of the Adjutant General of the Pennsylvania National Guard to request Federal representation by the Department of Justice in the judicial proceeding. The Bureau also suggests the

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judgment could have been satisfied under the Back Pay Act, 5 U.S.C. 5596, rather than out of state funds had payment been made directly to Mr. Witter.

Mr. Witter was a full-time civilian employee of the Pennsylvania National Guard from July 4, 1965, to July 12, 1967. As a condition of such employment he was required to be a member of the National Guard unit for which he worked.

On July 12, 1967, he resigned his position as a staff training assistant with the Pennsylvania National Guard so that he could go on active duty in Vietnam.

In February and May of 1969, he wrote to the Pennsylvania National Guard to request reinstatement to his former position or a similar position upon his anticipated release from active duty and return to the United States in July 1969. Upon his return he again requested reemployment but was denied reemployment on the basis that the position he had occupied had been filled and that there was no similar position available.

In July 1975, Mr. Witter brought suit against the Pennsylvania National Guard and the Adjutant General of the Pennsylvania National Guard for damages for the difference in salary and benefits he would have received had he been reemployed by the Pennsylvania National Guard and the salary he actually received for the period August 1969 to January 1974 when his earnings from other employment were no longer less than the pay of the National Guard position.

In considering Mr. Witter's claim for backpay the Court first considered whether, at the time he left for active duty, he was a state employee or a Federal employee to determine whether he would have reemployment rights as a Federal employee pursuant to 50 U.S.C. App. 459, or as a state employee under the Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. 2021 et seq.

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As stated by the Court's decision National Guard civilian employees or technicians became Federal employees pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. 709, effective January 1, 1969. Prior to the effective date of the of 1968 act, such technicians were considered to be state employees. Maryland v. United States, 381 U.S. 41, 53 (1965).

Accordingly, the Court determined that as Mr. Witter left his position to go on active duty prior to the effective date of the Act he was a state and not a Federal employee. As such, the Court found that Mr. Witter was entitled to reemployment upon his release from active duty pursuant to 38 U.S.C. 2021(a), 2024 which provide for reemployment of state employees after their release from limited periods of military service.

Where a private employer or a state or political subdivision thereof fails or refuses to reemploy an individual as required by these provisions 38 U.S.C. 2022 empowers the Federal district courts to "compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action". Pursuant to this provision the Court held that Mr. Witter was entitled to all the employee benefits he would have enjoyed had he been placed on military leave of absence by the Pennsylvania National Guard when he left for active duty and reemployed upon his return. In addition, the Court found that under the Pennsylvania Military Leave of Absence Act, 5 P.S. 7301 et seq., Mr. Witter was entitled to be placed on military leave of absence when he volunteered for active duty, and to be reemployed upon his return.

On October 2, 1979, the trial Judge ordered the defendant to pay Mr. Witter damages in the total amount of \$6,115.03. This amount represents backpay for the period from August 1969 through January 1974, together with interest computed at the rate of 6 percent.

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The Bureau has advised that \$853.20 of the judgment amount has been paid out of Federal funds. This amount represents backpay for the 30-day period from August 31, 1969, to September 29, 1969. This payment was made on the basis of a determination by the Pennsylvania National Guard that Mr. Witter would have been reinstated to his prior position as a National Guard technician, but that he would have been terminated upon 30 days' notice due to lack of military eligibility as there was no military position in the unit for which he was eligible. The balance, together with court costs, or a total of \$5,326.53, was paid by the Adjutant General of Pennsylvania out of state funds.

The issue before us, as stated above, is whether any Federal funds are available to reimburse the Commonwealth of Pennsylvania for the payment of such judgment.

Section 724a of title 31, United States Code, provides, in pertinent part, as follows:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of sections 2414, 2517, 2672, or 2677 of Title 28 * * * together with such interest and costs as may be specified in such judgments or otherwise authorized by law.* * *"

Section 2414 of title 28, United States Code, provides, in pertinent part, as follows:

"Payment of final judgments rendered by a district court against the United States shall be made on settlements by the General

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Accounting Office. Payment of final judgments rendered by a State or foreign court or tribunal against the United States, or against its agencies or officials upon obligations or liabilities of the United States, shall be made on settlements by the General Accounting Office after certification by the Attorney General that it is in the interest of the United States to pay the same.

"Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final."

The United States was not named as a defendant in the present case. Furthermore, the judgment in Witter was against the Commonwealth of Pennsylvania and not the United States.

In Matter of Charles H. Chaudoin v. Clarence E. Atkinson, B-182219, October 23, 1974, we considered the question of the availability of appropriated funds under 31 U.S.C. 724a and otherwise for settlement of an action against a named defendant other than the United States. In the Chaudoin case the Court held that the Adjutant General of the state National Guard abused his discretion under 32 U.S.C. 709 when he dismissed a National Guard technician. The Court held therein that the Adjutant General for the state National Guard was an agent of the United States on the basis that 32 U.S.C. 709 charges the Adjutant Generals of State National Guards with the employment and administration of the civilian technicians who are Federal employees. Notwithstanding that determination, our Office held that Federal funds were not

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available for the payment of a final judgment although the cause of action arose from an order issued by an agent of the Government, since the judgment was against the individual who issued the order rather than the United States.

In the instant case, the judgment was against the Commonwealth of Pennsylvania. The Court expressly assumed jurisdiction of the case and awarded backpay under 38 U.S.C. 2022 which applies only to private, state or local government employers and not to those of the Federal Government.

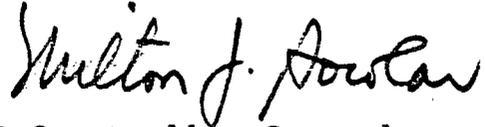
Under the circumstances of this case, the appropriation provided by 31 U.S.C. 724a would not be available for payment of the judgment. See B-182219, supra. Thus, we must conclude that funds pursuant to 31 U.S.C. 724a are not available for reimbursement to the Commonwealth of Pennsylvania for the cost of the judgment in Witter.

As to the possible availability of funds from any other sources, it is well settled that the appropriations or funds provided for regular governmental operations or activities, out of which a cause of action arose, are not available to pay judgments of courts in the absence of specific authority 34 Comp. Gen. 221 (1954) and 40 Comp. Gen. 312 (1964). We do not know of any such authority which would be applicable to this case. See B-182219, supra. Although Mr. Witter would have been paid from Federal funds had he been reinstated as an employee of the Pennsylvania National Guard subsequent to the National Guard Technician's Act of 1968, supra, this would not operate to make Federal funds available for payments under the Back Pay Act, 5 U.S.C. 5596, since under the doctrine of res adjudicata the matter has been settled by the Courts. Under the judgment rendered the Commonwealth of Pennsylvania is liable to Mr. Witter.

In accordance with the above, appropriated funds are not available to reimburse the Commonwealth of Pennsylvania the cost of the judgment in Witter.

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Thus, that part of the judgment paid out of Federal funds in the amount of \$853.20 is for collection from the Commonwealth of Pennsylvania.

A handwritten signature in cursive script that reads "Milton J. Fowler".

For the Comptroller General
of the United States